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No. 87-853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SIERRA PACIFIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEVADA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

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REPLY BRIEF FOR PETITIONER

Of Counsel:
WILLIAM E. PETERSON
WOODBURN, WEDGE, BLAKEY
and JEPPSON
One East First Street
Suite 1600
Reno, Nevada 89505
(702) 329-6131

JOHN MADARIAGA
JAMES D. SALO
SIERRA PACIFIC POWER COMPANY
6100 Neil Road
Reno, Nevada 89510
(702) 689-4228

E. BARRETT PRETTYMAN, JR.*
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5685
Counsel for Petitioner

* Counsel of Record

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1. Respondent Public Service Commission argues that this Court should deny certiorari because the decision below was based on laches. The invocation of laches by the court below, however, simply framed the federal questions presented by this case. The court below ruled that Sierra Pacific was guilty of laches only because it had not pursued a remedy under state law that was simply not available until the very ruling that asserted laches. Under virtually identical circumstances, this Court held that a state court finding of laches "is not sufficient independently to support the judgment." *Brinkerhoff-*

Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 682 (1930).

2. The Nevada Supreme Court denied Sierra Pacific any recovery of over 14 million dollars in expenses—expenses to which it was concededly entitled—because Sierra Pacific did not seek those expenses from the Commission while litigation was pending in the courts. If that was all there was to this case, the Commission might well be correct that the case turns on laches. The federal questions that merit review by this Court arise from the fact that until the decision below, state law clearly prevented Sierra Pacific from doing what the court below said it should have done:

- State law provided that "the commission shall not consider an application by a public utility if the justification * * * includes any items of expense or rate base which * * * are the subject of pending litigation * * *." Former Nev. Rev. Stat. § 704.100(3).
- The Nevada Supreme Court had ruled that this provision meant precisely what it said. *Southwest Gas Corp.* v. *Public Service Comm'n*, 92 Nev. 48, 58, 546 P.2d 219, 225 (1976).
- The Commission itself relied upon the provision in *rejecting* an application by Sierra Pacific for the expenses, proving that Sierra Pacific could not have done what the court below said it should have. *See* Pet. at 11-12.

The court below was free to change this established view of state law, and it did. *See* App. at 8a. It was not free, however, to deprive Sierra Pacific of property to which it was concededly entitled because Sierra Pacific relied upon the previously settled state law. Such action —whether labeled laches, waiver, or anything else— constitutes a deprivation of property without due process in violation of the Fourteenth Amendment. *Brinkerhoff-Faris*, 281 U.S. at 679; *NAACP* v. *Alabama ex rel.*

Patterson, 357 U.S. 449, 457-458 (1958); *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964).

3. The invocation of "laches" also simply frames the second federal question presented by Sierra Pacific—whether the court below denied Sierra Pacific due process by failing to afford it any notice or opportunity to be heard on factual questions implicated only by the court's unforeseeable change in state law. Even under the court's new view, Sierra Pacific could only have applied to the Commission for the subject expenses if certain facts were found to exist. *See* Pet. at 14. Sierra Pacific was denied any opportunity to be heard on those factual questions, because they were not even at issue until the court below overturned previously settled state law.

4. The recent repeal by the Nevada Legislature of Nev. Rev. Stat. §§ 704.100(3) and (5) has no effect whatever on this Petition, or on the continuing broader significance of the questions presented. Sierra Pacific is not, of course, asking this Court to construe Sections 704.100(3) and (5), or any other aspect of Nevada law. Those provisions—by barring any application by Sierra Pacific during the pendency of litigation—simply set the stage for the federal questions presented when the court below overturned settled state law. As noted in the Petition, Pet. at 18-20, state courts are overturning previously settled state law with increasing frequency, raising the same questions presented by this case. Whether or not the state law overturned by the court decision formally remains on the books is irrelevant to consideration of these federal questions.

5. Indeed, the Legislature's repeal of Sections 704.100 (3) and (5) confirms Sierra Pacific's position as to what happened in this case. Those provisions barred Sierra Pacific from seeking the expenses at issue while litigation was pending. The court below, however, in denying Sierra Pacific any relief precisely *because* it did not seek

the expenses while litigation was pending, effectively repealed Sections 704.100(3) and (5). The Legislature's action—taken after the decision below—merely ratified the change in state law effected by the court.

The Legislature's revealing action highlights the need for review by this Court. If the Legislature's action stood alone, and the Commission denied Sierra Pacific its legitimate expenses on the ground that it had not sought them earlier, retroactively applying the *Legislature's* repeal, the constitutional violation would be clear. As Justice Brandeis noted for a unanimous Court in *Brinkerhoff-Faris*, "[t]he violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute." 281 U.S. at 680.

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For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

Of Counsel:
WILLIAM E. PETERSON
WOODBURN, WEDGE, BLAKEY and JEPPSON
One East First Street
Suite 1600
Reno, Nevada 89505
(702) 329-6131

JOHN MADARIAGA
JAMES D. SALO
SIERRA PACIFIC POWER COMPANY
6100 Neil Road
Reno, Nevada 89510
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